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IN THE

Supreme Court of the United States

October Term, 1960

No. 446

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petition for Rehearing of Order Denying Petitioners' Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States

The Petitioners, pursuant to Rule 58 of this Court, pray that the Court reconsider its order of December 5, 1960 denying their Petition for a Writ of Certiorari, and, in order that complete justice may be done, pray that the Court rehear their application as to the need for this Court's issuance of a Writ of Certiorari. As grounds for such reconsideration and rehearing the Petitioners respectfully show:

1. The action of the Court of Appeals has deprived the

Petitioners of a fair, complete and impartial trial.

(a) The Court of Appeals has permitted a piecemeal and abridged trial of the issues.

(b) The novel procedure adopted and carried out by the Courts below was prejudicial and unfair to the Petitioners, and calls for this Court's power of supervision and correction.

II. The Courts below have erroneously decided that a portion of a bridge structure was not constructed in violation of law although such construction deviated from the plans approved by the Secretary of War.

PREFACE

Reference of the Court is respectfully craved to pages 2, 3, 4, 7 and 12 of our Petition for Writ with respect to the Court's Jurisdiction, Opinions Below, Questions Presented, Statutes involved, Statement of Case and Statement of Facts in this cause.

GROUNDS FOR REHEARING

POINT I. THE ACTION OF THE COURT OF APPEALS HAS DEPRIVED THE PETITIONERS OF A FAIR, COMPLETE AND IMPARTIAL TRIAL.

(a) The Court of Appeals has permitted a piecemeal and abridged trial of the issues.

In his decree of October 17, 1957, following the first trial, the United States District Judge for the Western District of South Carolina (sitting in the Eastern District of South Carolina) found that the vessel's improper navigation was the sole proximate cause of the damages to ship and bridge, and held the vessel solely at fault. 153 F. Supp. 359)

In its decision of November 13, 1958 (261 F. 2d 563), the Court of Appeals for the Fourth Circuit affirmed in part, reversed in part, and remanded the case for a division of damages, stating in part, as follows: (1a, 7a, 10a)

> . . . We believe that the factual situation here presented calls for the clear application of the rule as stated in *The Pennsylvania*, 86 U.S. (19 Wall. 125, to the effect that the burden rests upon the party guilty of a statutory fault to show not only that *probably* his fault did not contribute to the disaster, *but that it could not have done so.*
>
> * * * *
>
> . . . Applying these principles to the facts at hand, we do not believe that the appellee has met the required burden. While appellee suggests that the protruding gear racks were not stressed by appellant at the time of trial in the lower court, the violation existed and was apparent from the drawings. *Moreover, were we to disregard the protruding gear racks, we would arrive at a like conclusion because of the deviations from the approved plan.* To hold otherwise would require us to conclude that a vessel, passing through the bridge opening at a place it admittedly had the right to be, would sustain only minor damage to its superstructure and, in turn, cause little or no damage to the bridge.
>
> We agree with the district court in its finding that the bridge fender systems should not be expected to withstand an impact from a 10,000-ton vessel making 5 knots or more under a "Full Speed Ahead" bell, *but we do not feel that the resistance offered by the fendering system could not possibly have caused the ship to deviate to some extent, thus enabling it to avoid striking the pro-*

truding gear rack. The force of this argument leads us to the inevitable conclusion that the appellee has not carried the admittedly heavy burden of establishing that its statutory fault could not have, under the "reasonable possibility" test, contributed to the accident and resulting damages. The fact that the approved plans and specifications made no provision for tolerance as to protruding gears; that the gears did protrude a matter of 18 inches from the outer face of the abutment; that the vessel's superstructure would have collided with the uppermost portion of the raised bascule span had the ship been navigated parallel with the fender system; and that the bridge opening was substantially reduced by reason of the unlawful structure; all point convincingly to appellee's difficult position in sustaining the burden imposed by reason of these statutory faults. *From a review of the record we think it clear that appellee has not shown that the unlawful structure could not, under the "reasonable possibility" test, have contributed to the collision.* (Emphasis added)

° ° ° °

. . . Holding that the district court was in error in concluding from the facts in this case that appellee had met the burden imposed by law, and being of the opinion that the situation herein presented calls for a division of damages, the decree of the district court is

Affirmed in part, Reversed in part, and Remanded.

After granting a rehearing, the Court of Appeals in its decision of June 8, 1959 (268 F. 2d 27) set aside its direction that damages be divided, but affirmed in part, reversed in part, the decree of the lower court, and remanded the case

to the District Court for further findings. In its decision, the Court of Appeals stated in part as follows: (12a)

> . . . We had previously concluded that, under the situation presented, the damages should be divided. On rehearing we adhere to our previously expressed view that the improper navigation of the appellant vessel contributed to the resulting damage, but we find it necessary to remand the case to the district court for further proceedings, without directions to divide the damages, to the end that specific findings may be made in light of the Pennsylvania rule. *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125 L. Ed. 148.
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> A portion of the prior opinion discusses at length the protruding gear rack, the authority for which is not disclosed on the face of the permit issued by the War Department.
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> * * * * *
>
> . . . If such a protrusion was contemplated by the plans, it is not, of course, a deviation from the plans and specifications and there would be no statutory fault with respect to the gear racks, as the structure would be lawful to that extent. *We therefore conclude, in order that this important issue be decided in the light of all the available testimony, that on the remand the parties should have an opportunity to present further evidence on the point and that* the District Judge should make appropriate findings based on the present record and such additional evidence as the parties may present as to whether the protrusion of the gear racks was in accordance with or in violation of the permit issued by the War Department.
>
> We think it clear that the Pennsylvania rule must be applied with relation to the statutory fault existing as to

> the maximum elevation of the raised bascule spans. While we accepted the lower court's finding that the initial impact between the vessel and the bridge was at the gear rack, we do not agree on the record before us that the damage to the bascule span would not necessarily have occurred under the "reasonable possibility" test as stated in our previous opinion. The trial court, having failed to apply the Pennsylvania rule, may now consider the existing record and will undoubtedly permit further evidence on this point, as well as upon any other contended statutory fault. (Emphasis added)

In his decree of September 29, 1959, following the second trial (177 F. Supp. 76), the same District Judge again held the vessel solely at fault, finding that the protruding gear rack was not a feature affecting navigation and did not violate the Secretary of War's permit. The District Court further held that no violation of the permit could possibly have contributed to the damages, although the Court excluded and refused to consider Petitioners' evidence of such a possibility.

In its decision of May 19, 1960 (278 F. 2d 951), the Court of Appeals for the Fourth Circuit affirmed the District Court's decree, and stated in part as follows: (19a)

> . . . We do not suggest that, in applying the Pennsylvania rule, a court may not, to some extent, speculate as to what may have happened because of the existing statutory fault. Indeed, the rule itself requires such an approach. However, this is likewise a factual matter to be determined from credible evidence, and we cannot say that the District Court was clearly in error in reaching the conclusion that no material damage would have resulted if the vessel had not struck the gear rack.
>
> * * * *

> . . . The trial court concluded, after a full hearing, that the overhanging bascule span could not have contributed to the consequent damage under the peculiar circumstances of this case. Irrespective of our personal views, we cannot say that this finding is plainly erroneous, and this is so even though a portion of the vessel's superstructure would perhaps have come in contact with the overhanging bascule if the ship had proceeded through the opening without striking the gear rack.
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> . . . We must assume that, on remand, the trial court concluded that the vessel would not have deviated and thus avoided striking the gear rack, irrespective of the condition of the fendering system on the western side.

(b) The novel procedure adopted and carried out by the Courts below was prejudicial and unfair to the Petitioners, and calls for this Court's power of supervision and correction

In the first decision of the Court of Appeals, following the first trial, the Court of Appeals made it perfectly clear, and so ruled, that *from a review of the record* there were numerous violations of the permit which could with reasonable possibility have contributed to the damages and that the South Carolina Highway Department had failed to carry the burden imposed on it by The Pennsylvania Rule. Therefore, the Court of Appeals correctly directed a division of damages. This was the proper procedure.

In *Dwyer Oil Transport Co.* v. *The Edna M. Matton*, 255 F. 2d 380, the Court of Appeals for the Second Circuit similarly reversed a District Court decree of sole liability, and directed a division of damages, stating in part as follows: (p. 382)

> . . . In the case at bar the appellant specifically requested a finding of statutory violation and joint liability against

the Corporal because of its ineffective lookout. The court's refusal so to find, in the light of his conclusions, must be taken as a determination that the statutory violation could not have played any part in the ultimate collision. We think, however, that on the record in this case such a finding would have been clearly erroneous.

* * * *

. . . For aught that appears, a proper lookout on the Corporal could thus have caused her, by reversing sooner, to avert the collision.

We can only conclude that the Corporal did *not* sustain the burden of proof which, under the Pennsylvania rule, came into play once her failure to maintain a proper lookout was established.

* * * *

. . . The decree is modified to hold the Corporal jointly at fault with the Matton.

In *States Steamship Co.* v. *Permanente Steamship Corp.*, 231 F. 2d 82, the Court of Appeals for the Ninth Circuit also reversed a District Court decree of full damages, and directed a division of damages in the following language: (p. 88)

. . . Whatever the true explanation, the Permanente Silverbow's own version leaves unanswered the reasonable doubt whether the Colorado's last-minute turn to starboard would ever have been made, had the Permanente Silverbow given any signal whatever of her just-completed turn to port.

* * * *

. . . .Accordingly the trial court's findings that "the collision was caused solely by the * * * faults of the Colorado, and that neither vessel's failure to sound sig-

nals was or could have been a cause of the collision," must be held clearly erroneous.

. . . To repeat the words of this Court in Kaseroff v. Petersen, supra, 136 F. 2d at page 186: "Both vessels being at fault, each had the burden of proving that her fault * * * could not have been one of the causes of the collision. * * * The burden was not sustained. The evidence * * * shows that each vessel's fault not only could have been, but probably was, one of the causes. We conclude that the damages should be equally divided."

In *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2d 537, 539, Judge Learned Hand stated as follows:

. . . Ordinarily we should accept the judge's finding that the failure to set sufficient lights "did not in fact cause the accident," but a different rule applies to the breach of a statutory duty from the breach of an ordinary duty. The doctrine of The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148, is that when the fault consists in the breach of a "statutory rule intended to prevent collisions * * * the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

* * * *

. . . It seems to us impossible to be sure beyond reasonable doubt that if the lights had been visible for 6000 feet, the "Lion" would nevertheless have failed to act in season, especially when it needed so little added time to clear the "icebreaker".

The decree will be modified to award the libellant only half damages.

In none of these cases was the statutory violator given a second bite at the cherry and the chance to create a new record. However, in its decree of June 8, 1959 the Court of Appeals in the case at bar, after rehearing, remanded the case to the District Judge for further findings on the issue of whether the *protruding gear rack* constituted a violation of law, notwithstanding that the Court of Appeals had previously held that there were other clear violations of the statutory permit, and adhered to its ruling that *on the record* the bridge-owner had failed to bear its statutory burden under the Pennsylvania Rule.

By what authority did the Court of Appeals remand this case to the District Court to query whether the protruding gear rack was violative of the permit, when the Court of Appeals had held and reaffirmed its own holding that there were other bases on which to direct a division of damages, namely that irrespective of the gear racks, there were violations of law which could reasonably on the record have contributed to the disaster?

If the bridgeowner had failed to sustain its burden under the Pennsylvania Rule as the Court of Appeals held, why was it necessary to remand the case on the issue of the gear rack? When the Court of Appeals did so, it gave the statutory violator two bites at the cherry, and the opportunity to explain away on a new record its failures in proof on the first record.

We submit that not only was the South Carolina Highway Department thus allowed to try the case in piecemeal fashion, so that it could start over and mend its bridges with the "further evidence" permitted by the Court of Appeals in its second decision but the shipowner was deprived of the corresponding right to start over and adduce other evidence as to the relationship of the various permit violations to the dis-

aster. We repeat that the District Court excluded and refused to consider any evidence bearing on a possible relationship, except with respect to the gear rack.

The procedure adopted by the Court of Appeals and consummated by the District Court allowed the South Carolina Highway Department to reopen the case on the unnecessary issue concerning the gear rack violation, and to thereby retry issues which the Court of Appeals had adjudicated against the Highway Department, namely its failure to bear the burden of the Pennsylvania Rule. The result was to give the Highway Department a complete retrial on all issues which had been adjudicated against it, and at the same time restrict the vessel to an abridged and incomplete trial, limited to merely contesting any showing thereafter made by the Highway Department on the retrial.

We submit that this novel procedure, whereby the Respondent was permitted to reopen issues adversely determined against it, and whereby the Petitioners were foreclosed from a complete inquiry into and determination of the issues in the cause, was prejudicial and unfair to the Petitioners.

We earnestly submit that justice and fair play requires that this Court reconsider its order and rehear the matter, to the end that a writ of certiorari be granted.

POINT II. THE COURTS BELOW HAVE ERRONEOUSLY DECIDED THAT A PORTION OF A BRIDGE STRUCTURE WAS NOT CONSTRUCTED IN VIOLATION OF LAW ALTHOUGH SUCH CONSTRUCTION DEVIATED FROM THE PLANS APPROVED BY THE SECRETARY OF WAR.

In our Petition for Writ of Certiorari we presented points and argument revolving around a number of questions set

forth on pages 3 and 4 of said Petiton. Since the Court has denied our Petition without opinion, we are at a considerable disadvantage in evaluating the Courts reasoning or its reasons therefor. Accordingly, we are unable to focus the Court's attention to any misconception or fallacy on its part which may have been instrumental in its refusa of the petition.

Nevertheless, we must accept tha the Court gave due and sound consideration to all points preented by us. Accordingly, we can only rationalize that the Court's denial of our petition with respect to Questions 1, 2, 3, 4 5 and 10, 11 on pages 3 and 4 of our Petition for a Writ, a meaning that this Court has decided to leave the resolution of such questions to the Two Courts below.

However, we are at a loss to comprehend the Court's refusal to review the disposition of Questions 6, 7, 8 and 9, especially since no Court in this case has yet to even mention, much less refute the numerous authorities cited under Point 2 (on page 34) of our Petition for a Wit. In view of our conscientious belief that such decisions are authoritative and decisive of such questions in this case, we earnestly and respectfully request this Court to reconsider the same as additional grounds (under Point II hereof) for a rehearing.

CONCLUSION

It seems inconceivable to us that liability for full damages can be justly imposed upon the Petitioners in this cause. For all the foregoing reasons, the Petitioners respectfully urge that justice and fairness requir the Court to reconsider its

order denying the writ, and to rehear the matter to the end that a writ of certiorari be granted.

Wherefore, the Petitioners respectfully pray that this Court grant a rehearing and reconsideration of its order.

Respectfully submitted,

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CERTIFICATE

I, D. A. Brockinton, Jr., Counsel for the Petitioners herein, hereby certify that the foregoing Petition is presented in good faith and not for delay. I do hereby also certify that the said Petition is restricted to the grounds hereinabove specified.

D. A. BROCKINTON, Jr.